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# Comments: Defining "Disability" under the Americans with Disabilities Act

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# DEFINING "DISABILITY" UNDER THE AMERICANS WITH DISABILITIES ACT

## I. INTRODUCTION

The Americans with Disabilities Act ("ADA"),<sup>1</sup> enacted in 1990, seeks to eliminate discrimination against individuals with disabilities<sup>2</sup> in the areas of employment,<sup>3</sup> public services,<sup>4</sup> public transportation,<sup>5</sup> public accommodations,<sup>6</sup> and telecommunications.<sup>7</sup> In order to come under the protection of the ADA, an individual must satisfy the definition of disability developed in the statute and clarified by the federal regulations, including those promulgated by the Equal Employment Opportunity Commission ("EEOC").<sup>8</sup> The ADA's definition of "disability" is nearly identical to the definition of "individual with handicaps"<sup>9</sup> contained in the amended Federal Rehabilitation Act of 1973 ("Rehabilitation Act").<sup>10</sup> Furthermore, Congress has indicated that the relevant case law interpreting the Rehabilitation Act should generally be applied to interpret the term disability under the ADA.<sup>11</sup>

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1. 42 U.S.C. §§ 12101-12213 (1993).
  2. *Id.* § 12101(b).
  3. *Id.* §§ 12111-12117.
  4. *Id.* §§ 12131-12134.
  5. *Id.* §§ 12141-12165.
  6. *Id.* §§ 12181-12189.
  7. 47 U.S.C. § 225 (1993).
  8. 29 C.F.R. § 1630.2(g)-(l) (1993).
  9. Congress' change of terminology from individual with handicaps to disability "represents an effort . . . to make use of up-to-date, currently accepted terminology." S. REP. NO. 116, 101st Cong., 1st Sess. 21 (1989).
  10. 29 U.S.C. § 706(8)(B) (1988). The original definition of individual with handicaps under the Rehabilitation Act did not contain the third prong of the ADA definition—"is regarded as having such an impairment." See S. REP. NO. 1297, 93rd Cong., 2d Sess. 37-39 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6373, 6388-90. In 1974 Congress amended the Rehabilitation Act to include this language to "clarif[y] the intention to include those persons who are discriminated against on the basis of handicap, whether or not they are in fact handicapped." *Id.* at 39, *reprinted in* 1974 U.S.C.C.A.N. at 6389. This subsection includes "those persons who do not in fact have the condition which they are perceived as having, as well as those persons whose mental or physical condition does not substantially limit their life activities and who thus are not technically within [the first prong] in the new definition." *Id.* at 39, *reprinted in* 1974 U.S.C.C.A.N. at 6389-90.
  11. H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. II, 50 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 332-66; H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. III, 27 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 450-54; S. REP. NO. 116, *supra* note 9 at 21; EEOC Interpretive Guidelines, 56 Fed. Reg. 35,740 (1991).

To comprehend the meaning of the term disability under the ADA, one must understand the relationship between the ADA, the applicable regulations, and prior decisions. Consequently, section II of this Comment first examines the ADA's definition of disability and the relevant EEOC regulations. Second, section III discusses the relationship between the ADA's definition of disability and the Rehabilitation Act's definition of individual with handicaps. Third, section IV reviews the Rehabilitation Act decisions. Finally, section V analyzes the ADA's definition against the background of the EEOC regulations and the Rehabilitation Act decisions.

## II. THE ADA'S DEFINITION OF DISABILITY

Historically, society has isolated and segregated individuals with disabilities. Discrimination still persists in "critical areas, such as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting and access to public services."<sup>12</sup> The ADA was enacted to eliminate these types of discrimination against individuals with disabilities.<sup>13</sup>

In order to come under the protection of the ADA, an individual must first demonstrate that he has a disability.<sup>14</sup> The ADA's definition of disability consists of three prongs: "(A) [A] physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such impairment."<sup>15</sup> The term disability also includes "a person infected with the Human Immunodeficiency Virus (HIV)."<sup>16</sup> The ADA, however, specifically excludes certain conditions from the definition of disability,<sup>17</sup> including transvestism,<sup>18</sup> current illegal drug use,<sup>19</sup> homosexuality, and bisexuality.<sup>20</sup>

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12. 42 U.S.C. § 12101(a)(3) (1993).

13. *Id.* § 12101(b).

14. *Id.* § 12112(a). Title I provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual." *Id.*

15. *Id.* § 12102(2). The ADA's three prong test is based upon the three prong test as defined in the Rehabilitation Act. *See infra* part III.

16. H.R. REP. NO. 485, pt. II, *supra* note 11, at 52, *reprinted in* 1990 U.S.C.C.A.N. at 334. Congress explained that a person infected with HIV is covered under the first prong of the definition of the term disability because of the substantial limitation to procreation and intimate sexual relationships that exists as a result of being infected with HIV. *Id.*

17. Disability does not include "(1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identification disorders not resulting from physical impairments, or other sexual behavior disorders; (2) compulsive gambling,

Title I of the ADA requires that the EEOC issue substantive regulations to implement the employment section of the ADA.<sup>21</sup> Among other objectives, the Title I regulations seek to clarify the meaning of disability, by defining terms of art used in the statute, such as "physical or mental impairment,"<sup>22</sup> "major life activities,"<sup>23</sup> "substantially limits,"<sup>24</sup> "has a record of such impairment,"<sup>25</sup> and "is regarded as having such an impairment."<sup>26</sup>

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kleptomania, or pyromania; or (3) psychoactive substance use disorders resulting from current illegal use of drugs." 42 U.S.C. § 12211(b).

18. *Id.* § 12208.

19. *Id.* §§ 12114, 12210.

20. *Id.* § 12211(a).

21. *Id.* § 12116.

22. The EEOC has defined physical or mental impairment as

1) any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or

2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

29 C.F.R. § 1630.2(h) (1992).

23. According to the EEOC, major life activities include "[c]aring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i). The EEOC Interpretive Guidelines include within this term "those basic activities that the average person in the general population can perform with little or no difficulty," and it warns that the above list is not exhaustive. 56 Fed. Reg. 35,726, 35,741 (1991). Other major life activities include sitting, standing, lifting, and reaching. 29 C.F.R. 1630.2(i).

24. Title I regulations define substantially limits as being

(1) . . . (i) [u]nable to perform a major life activity that the average person in the general population can perform; or (ii) significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. § 1630.2(j)(1). According to the EEOC Interpretive Guidelines, the identification of whether a physical or mental impairment exists is only the first step in determining whether or not an individual is disabled. 56 Fed. Reg. 35,726, 35,741. Only if the impairment rises to the level of the disability, can the impairment be said to substantially limit one or more of the individual's major life activities. *Id.*

25. Under Title I regulations, has a record of such impairment means that an individual "has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities." 29 C.F.R. § 1630.2(k).

26. The phrase is regarded as having such an impairment means that an individual (1) [h]as a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as consti-

The regulations also provide a list of factors to be considered in determining whether an individual is substantially limited in a major life activity.<sup>27</sup> Of particular concern during the rulemaking process was the inclusion of the term "working" as one of the major life activities.<sup>28</sup>

### III. THE REHABILITATION ACT'S DEFINITION OF INDIVIDUAL WITH HANDICAPS

The Rehabilitation Act was enacted, in part, "to prevent discrimination against all handicapped individuals, regardless of their need for, or ability to benefit from vocational services, in relation to federal financial assistance in the areas of employment, housing, transportation, education, health services, or any other [f]ederally-aided programs."<sup>29</sup> Unlike the ADA, the Rehabilitation Act employs the term of art, individual with handicaps.<sup>30</sup> Individual with handicaps is defined as any person "who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment."<sup>31</sup> As a comparison between the definitions of individual with handicaps and disability indicates, the

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tuting such limitation;

(2) [h]as a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(3) [h]as none of the impairments defined in paragraphs (h)(1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.

29 C.F.R. § 1630.2(l).

27. Factors to be considered in deciding if an individual is substantially limited in a major life activity include "(i) [t]he nature and severity of the impairment; (ii) the duration or expected duration of the impairment; and (iii) the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment." 29 C.F.R. § 1630.2(j)(2).

28. 56 Fed. Reg. 35,726 (1991). To alleviate concerns associated with the inclusion of "working," the EEOC provided the following definition:

With respect to the major life activity of working — (i) The term substantially limits means significantly restricted in the ability to perform either a class of jobs of a broad range or jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. § 1630.2(j)(3).

29. S. REP. NO. 1297, *supra* note 10, at 37, *reprinted in* 1974 U.S.C.C.A.N. at 6388.

30. 29 U.S.C. § 706(8)(A) (1988).

31. *Id.*

Rehabilitation Act is the model upon which the ADA's definition is based.<sup>32</sup>

#### IV. FURTHER DEFINING DISABILITY UNDER THE ADA: A REVIEW OF THE REHABILITATION ACT DECISIONS

Following the passage of the Rehabilitation Act, extensive litigation occurred over the meaning of individual with handicaps. As the federal courts resolved these various cases, their resulting decisions slowly created a more comprehensive definition of individual with handicaps. As a result, federal courts, heeding Congress' directive to apply the Rehabilitation Act decisions to ADA cases,<sup>33</sup> have a more comprehensive framework within which to operate. More significantly, however, is the impact this comprehensiveness will have as the courts interpret the ADA's definition of disability. As the courts rely upon the Rehabilitation Act decisions, the more likely it is that future ADA decisions will develop uniformly with less controversy over what type of conditions qualify as disabilities. A review of the Rehabilitation Act decisions is, therefore, important.

##### A. The Leading Decisions

Three leading federal cases, analyzing the term handicapped individual under the Rehabilitation Act, include *School Board of Nassau County v. Arline*,<sup>34</sup> *E. E. Black, Ltd. v. Marshall*,<sup>35</sup> and *Jasany v. United States Postal Service*.<sup>36</sup> In *Arline*, the United States Supreme Court held that a teacher, who suffered from a susceptibility to tuberculosis, could be classified as a handicapped person within the meaning of the Rehabilitation Act.<sup>37</sup> Arline suffered tuberculosis in such an acute form that it affected her respiratory system and necessitated her being hospitalized.<sup>38</sup> Working with the first prong of the definition and the regulations, the Court determined that Arline had a physical impairment.<sup>39</sup> According to the Court, because Arline had been hospitalized for tuberculosis, she could be considered a handicapped individual under the second prong of the definition since she had a record of impairment.<sup>40</sup>

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32. See *supra* notes 9-10 and accompanying text.

33. See *supra* text accompanying note 11.

34. 480 U.S. 273 (1987).

35. 497 F. Supp. 1088 (D. Haw. 1980).

36. 755 F.2d 1244 (6th Cir. 1985).

37. *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 289 (1987).

38. *Id.* at 281.

39. *Id.*

40. *Id.*

In an attempt to justify the discriminatory treatment, the School Board argued that tuberculosis is a contagious disease.<sup>41</sup> The Court, however, rejected this line of reasoning.<sup>42</sup> The Court emphasized that "[a]llowing discrimination based on the contagious effects of a physical impairment would be inconsistent with the basic purpose of [the Rehabilitation Act]."<sup>43</sup>

The seminal case of *E. E. Black, Ltd. v. Marshall*<sup>44</sup> delineated the factors which must be satisfied in order to find that an individual is substantially limited in the major life activity of working. Crosby, a union member, sustained back injuries on the job.<sup>45</sup> Subsequently, he was referred by the union to E. E. Black, Ltd., a general construction contractor ("the contractor"), which required all apprentice carpenters to undergo a pre-employment physical examination.<sup>46</sup> The examination revealed "a congenital back anomaly."<sup>47</sup> Based upon this examination, the contractor refused to hire Crosby.<sup>48</sup> A second physical examination was conducted and revealed additional back injuries, specifically a "spina bifida occulta and a mild rotoscoliosis."<sup>49</sup> The second examining physician concluded that these injuries did not prevent Crosby from performing the job of apprentice carpenter.<sup>50</sup> Crosby, however, was never hired by the contractor for an apprentice carpenter position.<sup>51</sup>

The *E. E. Black* court focused upon all three prongs of the Rehabilitation Act's handicapped definition.<sup>52</sup> The court emphasized that the third prong of the definition "refers to those individuals who are perceived as having a handicap, *whether an impairment*

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41. *Id.*

42. *Id.* at 282.

43. *Id.* at 284. The ADA, however, lists as an employer defense that "[t]he term 'qualification standard' may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. § 12113(b) (1993). Furthermore, individuals who have an infectious or communicable disease which cannot be reasonably accommodated may be refused assignment to a job involving food handling. *Id.* § 12113(d)(2). For a list of infectious and communicable diseases which are transmitted through the handling of the food supply see *id.* § 12113(d)(1).

44. 497 F. Supp. 1088 (D. Haw. 1980).

45. *Id.* at 1091.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* "Spina bifida occulta is an anomaly characterized by the defective closure of the bony encasement of the spinal cord. Rotoscoliosis is an anomaly which involves a narrowing of the disc space caused by a slight rotation of the spine." *Id.* n.1.

50. *Id.* at 1091-92.

51. *Id.* at 1092.

52. *Id.* at 1097.

exists or not, but who, because of attitudes or for any other reason, are regarded as handicapped by employers."<sup>53</sup> Regarding the second prong, the court stated that a "handicapped individual is 'substantially limited' if he or she is likely to experience difficulty in securing, retaining or advancing in employment because of a handicap."<sup>54</sup> The court then noted that the definitions contained in the Rehabilitation Act are "personal and must be evaluated by looking at the particular individual . . . . It is the impaired individual that must be examined, and not just the impairment in the abstract."<sup>55</sup> Although an examining physician had concluded that Crosby's back injuries did not prevent him from performing the job's duties, the contractor perceived Crosby as being handicapped.<sup>56</sup> Therefore, the court held that Crosby was a handicapped individual under the third prong of the definition.<sup>57</sup>

The importance of *Jasany v. United States Postal Service*<sup>58</sup> stems from its analysis rather than from its holding that the physical impairment of crossed eyes did not substantially limit a major life activity.<sup>59</sup> In *Jasany*, a distribution clerk trainee, who was born with a mild case of strabismus, commonly known as crossed eyes, was discharged by the United States Postal Service ("USPS").<sup>60</sup> During a ninety-day probationary period, Jasany developed eye strain, headaches, and excess tearing.<sup>61</sup> However, both prior to and after being discharged by the USPS, Jasany was able to fully participate in "school, work, sports, and recreational activities, as well as all other normal daily activities of every kind whatsoever without limitation."<sup>62</sup>

The Sixth Circuit held that the district court had "erred as a matter of law in finding that [Jasany] was a handicapped person within the meaning of [the Rehabilitation Act]."<sup>63</sup> Although the court found that Jasany had a physical or mental impairment,<sup>64</sup> this impairment did not have any effect on any of his other activities,

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53. *Id.* at 1097 (quoting 41 C.F.R. § 60-741, app. A (1993)) (emphasis supplied).

54. *Id.* at 1099 (quoting 41 C.F.R. § 60-741.2 (1993)).

55. *Id.* at 1099.

56. *Id.* at 1101-02.

57. *Id.* at 1102. For a more thorough analysis of this case see Andrew W. Haines, *E. E. Black, Ltd. v. Marshall: A Penetrating Interpretation of "Handicapped Individual" for Sections 503 and 504 of the Rehabilitation Act of 1973 and for Various State Equal Employment Opportunity Statutes*, 16 Loy. L.A. L. Rev. 527 (1983).

58. 755 F.2d 1244 (6th Cir. 1985).

59. *Id.* at 1250.

60. *Id.* at 1247.

61. *Id.*

62. *Id.*

63. *Id.* at 1250.

64. *Id.* at 1248.



including past jobs or other duties he performed at the USPS.<sup>65</sup>

### *B. Other Federal Court Decisions*

#### 1. Musculoskeletal Disabilities or Impairments

The lower federal courts have analyzed whether musculoskeletal disabilities or impairments meet the Rehabilitation Act's definition of handicapped with varying results. The United States District Court for the Southern District of New York held that a dislocated shoulder was a disability under the Rehabilitation Act in *Mahoney v. Ortiz*.<sup>66</sup> In *Mahoney*, a police officer applicant had suffered four or five shoulder dislocations prior to taking the New York City Police Department written exam.<sup>67</sup> After being considered ineligible to become a police officer because of the prior dislocations, he brought suit under the Rehabilitation Act.<sup>68</sup>

Quoting the Rehabilitation Act's definition of a handicapped individual, the court held that the applicant was a handicapped individual under the second and third prongs.<sup>69</sup> Basing its holding on the applicant's potential for "total incapacitation," the court reasoned that nearly total incapacitation is a "limitation on one or more of [the applicant's] major life activities."<sup>70</sup> According to the court, the applicant had established a prima facie case under the Rehabilitation Act.<sup>71</sup>

Persons impaired because of spinal deformities, amputation, and dwarfism have also been considered handicapped individuals within the meaning of the Rehabilitation Act. In *Thornhill v. Marsh*,<sup>72</sup> Thornhill, an employee of the Army Corps of Engineers, ("Corps") was discharged after a physical examination revealed that he had a congenital spinal deformity, preventing him from lifting more than fifty pounds.<sup>73</sup> The Corps refused to rehire Thornhill even after Thornhill's and the Corps' examining physicians concluded that the deformity did not limit his lifting capacity.<sup>74</sup>

Focusing on the third prong of the handicapped definition, the court held that a genuine issue of material fact existed as to whether

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65. *Id.* at 1250.

66. 645 F. Supp. 22 (S.D.N.Y. 1986).

67. *Id.* at 23.

68. *Id.*

69. *Id.* at 24.

70. *Id.*

71. *Id.*

72. 866 F.2d 1182 (9th Cir. 1989) (per curiam).

73. *Id.* at 1183.

74. *Id.*

Thornhill was a handicapped person under the Rehabilitation Act.<sup>75</sup> The court based its reasoning on the Corps' misplaced perception that Thornhill's spinal deformity prevented him from performing his duties.<sup>76</sup>

In *Longoria v. Harris*,<sup>77</sup> the parties did not dispute that an individual who had his right leg amputated below the kneecap was a handicapped individual under the Rehabilitation Act.<sup>78</sup>

Similarly, in *Dexler v. Tisch*,<sup>79</sup> the government stipulated that a USPS applicant with achondroplastic dwarfism, who was denied employment as a distribution clerk, was handicapped within the meaning of the Rehabilitation Act.<sup>80</sup> The significance of *Longoria* and *Dexler* stems from their addition of two disorders that can be considered as falling under the Rehabilitation Act's definition of handicapped.

Inconsistency, however, has occurred when the federal courts have considered whether back injuries and deformities satisfy the Rehabilitation Act's definition. In *Perez v. Philadelphia Housing Authority*,<sup>81</sup> a Pennsylvania State employee was discharged after having suffered back and leg injuries on the job.<sup>82</sup> Citing both the Rehabilitation Act and the Department of Health and Human Services regulations, the United States District Court for the Eastern District of Pennsylvania emphasized that determining who is a handicapped person depends on a case-by-case analysis of the facts.<sup>83</sup> The court then held that Perez had a physical impairment that substantially limited her activities.<sup>84</sup> The court based its holding on Perez' testimony that her back problems caused her considerable pain, affecting not only her work, "but also her ability to walk, sit, stand, drive, care for her home and child, and engage in leisure pastimes."<sup>85</sup> Therefore, the court concluded that Perez was a handicapped individual within the meaning of the Rehabilitation Act.<sup>86</sup>

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75. *Id.*

76. *Id.* at 1184.

77. 554 F. Supp. 102 (S.D. Tex. 1982).

78. *Id.* at 102-03.

79. 660 F. Supp. 1418 (D. Conn. 1987).

80. *Id.* at 1425. "Achondroplastic dwarfism is a growth disorder that affects all four extremities and results in short limbs and short stature." *Id.* at 1419. As a result of this condition, Dexler was four feet, five inches tall and had a vertical reach of 58 1/2 inches. *Id.* Furthermore, his horizontal reach was well below normal. *Id.*

81. 677 F. Supp. 357 (E.D. Pa. 1987), *aff'd*, 841 F.2d 1120 (3d Cir. 1988).

82. *Id.* at 359.

83. *Id.* at 360.

84. *Id.*

85. *Id.*

86. *Id.* at 360-61.

In *Coley v. Secretary of the Army*,<sup>87</sup> Coley, a civilian employee of the United States Army, filed suit under the Rehabilitation Act when he was denied reinstatement, following a short term disability period that involved a chronic back problem.<sup>88</sup> Coley's medical report prevented him from lifting or carrying objects in excess of fifteen pounds.<sup>89</sup> Furthermore, Coley could not work in excessive cold or dampness nor could he perform manual labor.<sup>90</sup>

Operating under the first prong of the definition, the court held that Coley was a handicapped person under the Rehabilitation Act because he had a physical impairment which substantially limited the major life activity of working.<sup>91</sup> The court found that Coley's "physical handicap was a significant barrier to his employment" because "[h]e was disqualified from all jobs requiring any degree of manual labor."<sup>92</sup> Therefore, according to the court, his "physical disability was a substantial limitation on his ability to work."<sup>93</sup>

The United States District Court for the Eastern District of California, in *Diaz v. United States Postal Service*,<sup>94</sup> considered the situation where a USPS employee, Diaz, who had suffered a lumbosacral strain of his back during the Vietnam War, experienced an additional back injury on the job.<sup>95</sup> Following his post-injury return to the job, Diaz was incapable of performing all the duties required of an USPS carrier, including lifting mail bags weighing up to seventy pounds.<sup>96</sup> After being discharged, Diaz brought suit, alleging that the USPS's discrimination against his handicap violated the Rehabilitation Act.<sup>97</sup>

In its opinion, the court focused upon the term major life activities.<sup>98</sup> Through reference to the regulations, the court defined major life activities to include "functions, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."<sup>99</sup> The court then held that the impairment had not substantially limited Diaz's major life activities since only seven of his sixteen absences had been caused by back-

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87. 689 F. Supp. 519 (D. Md. 1987).

88. *Id.* at 520.

89. *Id.* at 520-21.

90. *Id.* at 521.

91. *Id.*

92. *Id.*

93. *Id.*

94. 658 F. Supp. 484 (E.D. Cal. 1987).

95. *Id.* at 488.

96. *Id.*

97. *Id.* at 491.

98. *Id.*

99. *Id.* at 491 (quoting *Jasany v. United States Postal Serv.*, 755 F.2d 1244, 1248 (6th Cir. 1985)).

related problems.<sup>100</sup> The court further bolstered its holding with the observation that Diaz had been able to perform his regular duties upon his return to the job.<sup>101</sup>

Knee injuries have not been found to place an individual under the protection of the Rehabilitation Act. In *Elstner v. Southwestern Bell Telephone Co.*,<sup>102</sup> Elstner, a telephone company employee, whose duties included pole tree climbing, originally injured his knee at a softball game, and then after recovering, reinjured the same knee on the job.<sup>103</sup> Elstner underwent corrective knee surgery on several occasions.<sup>104</sup> Although after the initial surgery Elstner was able to resume his normal duties, successive operations prevented him from performing those duties.<sup>105</sup> When Elstner applied for a hardship transfer,<sup>106</sup> he was transferred to a lower paying position.<sup>107</sup> Elstner then brought suit claiming handicap discrimination.<sup>108</sup> The basis of Elstner's handicap discrimination claim was the company's Affirmative Action Plan,<sup>109</sup> which employed the Rehabilitation Act's regulations' definition of a handicapped individual.<sup>110</sup>

The court held that Elstner was not a handicapped individual merely because he was unable to perform a single job.<sup>111</sup> According to the court, Elstner did not fit within the Rehabilitation Act's definition because he was not a handicapped individual.<sup>112</sup>

In *Alderson v. Postmaster General*,<sup>113</sup> Alderson, a USPS carrier, injured his knee after being chased by a dog.<sup>114</sup> After undergoing physical therapy, the treating physician concluded that Alderson's knee had regained full motion, and therefore, allowed Alderson to resume his daily work duties.<sup>115</sup> Once Alderson was dismissed because of his alleged slowness in delivering mail, he brought suit under the Rehabilitation Act.<sup>116</sup>

In its opinion, the court stated that the treating physician's findings did not support the assertion that Alderson was handicapped

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100. *Id.* at 491-92.

101. *Id.*

102. 659 F. Supp. 1328 (S.D. Tex. 1987), *aff'd*, 863 F.2d 881 (5th Cir. 1988).

103. *Id.* at 1332.

104. *Id.* at 1332-33.

105. *Id.*

106. *Id.* at 1333.

107. *Id.* at 1331.

108. *Id.*

109. *Id.* at 1341 n.1.

110. *Id.* at 1341 n.2.

111. *Id.* at 1343.

112. *Id.*

113. 598 F. Supp. 49 (W.D. Okla. 1984).

114. *Id.* at 51-52.

115. *Id.* at 52.

116. *Id.* at 50.

for any period of time.<sup>117</sup> Furthermore, the court held that there was no evidence that the USPS ever regarded Alderson as handicapped,<sup>118</sup> thereby removing Alderson from inclusion under the third prong of the Rehabilitation Act's definition.

Other conditions, such as left-handedness and body weight, have not been considered disabilities under the Rehabilitation Act. In *de la Torres v. Bolger*,<sup>119</sup> *de la Torres*, a left-handed USPS carrier was dismissed from the USPS because of unsatisfactory slowness in delivering the mail.<sup>120</sup> *De la Torres* brought suit against the USPS alleging handicap discrimination.<sup>121</sup> The Fifth Circuit determined that *de la Torres* did not satisfy the first element of the definition of an individual with handicaps under the Rehabilitation Act:<sup>122</sup> Being left-handed was "a physical characteristic, not a chronic illness, a disorder or deformity, a mental disability, or a condition affecting [*de la Torres's*] health."<sup>123</sup>

The United States District Court for the Central District of California reached a similar result in *Tudyman v. United Airlines*.<sup>124</sup> *Tudyman*, a male bodybuilder, applied for a position as a flight attendant with United Airlines and was subsequently denied employment.<sup>125</sup> At the time of his application, *Tudyman* weighed 178 pounds.<sup>126</sup> United Airlines required that flight attendants with *Tudyman's* height of five foot, seven inches, weigh no more than 163 pounds.<sup>127</sup> *Tudyman* filed suit against United Airlines claiming handicap discrimination.<sup>128</sup>

The court held that *Tudyman* was not a handicapped individual under the Rehabilitation Act because he failed to satisfy any of the definition's elements.<sup>129</sup> The court stated that *Tudyman* was not physically impaired because his unique body composition was self-imposed and voluntary.<sup>130</sup> Nor, according to the court, did his body

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117. *Id.* at 53.

118. *Id.*

119. 781 F.2d 1134 (5th Cir. 1986) (per curiam).

120. *Id.* at 1135.

121. *Id.*

122. *Id.* at 1137.

123. *Id.* at 1138.

124. 608 F. Supp. 739 (C.D. Cal. 1984).

125. *Id.* at 740.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 743-47.

130. *Id.* at 746. The court distinguished a "voluntary" weight gain from an "involuntary" weight gain such as one caused by a glandular problem. *Id.* Therefore, the court implied that an "involuntary" weight gain might bring an individual within the meaning of the Rehabilitation Act. *Id.*

weight limit the major life activity of working; he was only prevented from working as a flight attendant.<sup>131</sup> Finally, the court noted that United Airlines neither perceived nor regarded Tudyman as a handicapped individual.<sup>132</sup>

These federal decisions appear to indicate that persons afflicted with certain musculoskeletal impairments like shoulder dislocations, spinal deformities, amputation, and dwarfism will be considered handicapped, while those persons dealing with knee injuries, left-handedness or body weight problems will not be considered handicapped. The most acute conflict among the federal courts occurs where the impairment is related to an injury or deformity afflicting a person's back. Generally, where the impairment to the back is severe, the federal courts will likely consider that condition to be handicapping in nature.

## 2. Sensory Function Disabilities or Impairments

Generally, the courts have held that deaf individuals meet the Rehabilitation Act's definition of individuals with handicaps.<sup>133</sup> Similarly, individuals who are blind or legally blind have been found to satisfy the Rehabilitation Act's definition of individuals with handicaps.<sup>134</sup> Likewise, individuals, having vision in only one eye, have also been considered individuals with handicaps.<sup>135</sup>

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131. *Id.*

132. *Id.*

133. See *Strathie v. Department of Transp.*, 716 F.2d 227, 230 (3d Cir. 1983) (finding that a school bus driver, who wore a hearing aid, was a handicapped individual); *Davis v. Frank*, 711 F. Supp. 447, 453 (N.D. Ill. 1989) (finding that a USPS employee, who had been completely deaf since birth, was a handicapped individual); *Davis v. Southeastern Community College*, 424 F. Supp. 1341, 1345 (E.D.N.C. 1976) (finding that a nursing school applicant, who had a moderately severe hearing loss in the right ear and a severe hearing loss in the left ear, was a handicapped individual).

134. See *Sharon v. Larson*, 650 F. Supp. 1396, 1401 (E.D. Pa. 1986) (finding that an applicant for a learner's permit, whose corrected vision in the right and left eyes was 20/120 and 20/300, respectively, was a handicapped individual); *Norcross v. Sneed*, 573 F. Supp. 533, 536 (W.D. Ark. 1983) (finding that an applicant for a librarian position, whose corrected vision in the right eye was only 20/200 and whose left eye vision was unmeasurable, was a handicapped individual), *aff'd*, 755 F.2d 113 (8th Cir. 1985); *Gurmankin v. Costanzo*, 411 F. Supp. 982, 989 (E.D. Pa. 1976) (finding that an applicant for a teaching position, who was blind since the age of 12, was a handicapped individual), *aff'd*, 556 F.2d 184 (3d Cir. 1977), *cert. denied*, 450 U.S. 932 (1981).

135. See *Kampmeier v. Nyquist*, 553 F.2d 296, 299 n.7 (2d Cir. 1977) (finding that two junior high school students, who each had vision in only one eye, fell under the Rehabilitation Act's definition of individuals with handicaps); *Wright v. Columbia Univ.*, 520 F. Supp. 789, 791 (E.D. Pa. 1981) (finding that a university student, possessing vision in only one eye, was a handicapped individual).

A more extensive analysis, however, must be conducted if the vision impairment does not rise to the level of total blindness in at least one eye. For example, in *Padilla v. City of Topeka*,<sup>136</sup> the Supreme Court of Kansas held that a police officer applicant, having an uncorrected vision of 20/50 in each eye but a corrected vision of 20/20,<sup>137</sup> was not a handicapped individual under the Rehabilitation Act.<sup>138</sup> Although the court found that Padilla did possess a physical impairment, it stated that this impairment did not limit any of his life activities.<sup>139</sup>

Conversely, in *Fitzgerald v. Green Valley Area Education Agency*,<sup>140</sup> an applicant for a teaching position had multiple handicaps, including nocturnal epilepsy, dyslexia and left side hemiplegia due to cerebral palsy.<sup>141</sup> Because of the dyslexia, Fitzgerald was only able to read between a third and sixth grade level.<sup>142</sup> After the educational agency refused to hire him, Fitzgerald brought suit under the Rehabilitation Act.<sup>143</sup> The United States District Court for the Southern District of Iowa held that Fitzgerald was a handicapped individual under the Rehabilitation Act.<sup>144</sup> Based upon these federal decisions, one can conclude that a person with sensory impairment, which cannot be adequately corrected, will likely be considered a handicapped individual under the Rehabilitation Act.

### 3. Cardiovascular and Circulatory Disabilities or Impairments

Within the federal district courts, cardiovascular and circulatory impairments have been considered handicapping conditions subjecting individuals to the protection of the Rehabilitation Act. In *Bey v. Bolger*,<sup>145</sup> Bey, who had applied for a position as a distribution clerk with the USPS, was diagnosed as suffering from hypertension, cardiac enlargement, and an abnormal EKG.<sup>146</sup> Because of these conditions, the USPS refused to hire him.<sup>147</sup> The United States District Court for the Eastern District of Pennsylvania found that Bey was a

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136. 708 P.2d 543 (Kan. 1985).

137. *Id.* at 545.

138. *Id.* at 550.

139. *Id.*

140. 589 F. Supp. 1130 (S.D. Iowa 1984).

141. *Id.* at 1132.

142. *Id.*

143. *Id.*

144. *Id.* at 1135-36. *See also* *Stutts v. Freeman*, 694 F.2d 666, 668 (11th Cir. 1983) (holding that an individual, who had been diagnosed as dyslexic, was a handicapped individual).

145. 540 F. Supp. 910 (E.D. Pa. 1982).

146. *Id.* at 920.

147. *Id.* at 913.

handicapped individual within the meaning of the Rehabilitation Act because (1) he had a "record of a physical impairment, cardiovascular disease;" and (2) the USPS "regarded him as handicapped because of his continuing uncontrolled blood pressure, cardiac enlargement and abnormal electrocardiogram."<sup>148</sup>

Similarly, the United States District Court for the District of Maryland, in *Carty v. Carlin*,<sup>149</sup> considered a situation where the USPS had taken discriminatory measures. Carty, a postal employee, was discharged from employment as a custodian by the USPS, after suffering a heart attack and being hospitalized for severe depression.<sup>150</sup>

Focusing on the first prong of the Rehabilitation Act's definition, the court examined several factors to determine if an impairment is so severe as to substantially limit employment potential. The factors to be considered include "the number and type of jobs from which the impaired individual is disqualified, the geographical area to which the individual has a reasonable access, and the individual's job expectations and training."<sup>151</sup>

Applying these three factors, the court found that Carty had not demonstrated that the position of custodian was the only one he was incapable of performing.<sup>152</sup>

The court then focused on the second prong of the definition and determined Carty had a physical and mental impairment<sup>153</sup> based on Carty's record of medical and psychiatric treatment.<sup>154</sup> Therefore, the court held that it could not state that Carty did not meet the definition of a handicapped person under the Rehabilitation Act.<sup>155</sup>

The United States District Court for the District of Rhode Island analyzed the Rehabilitation Act's definition of a handicapped individual in *Bento v. I.T.O. Corp. of Rhode Island*.<sup>156</sup> Bento, a long-shoreman, suffered a back injury at work.<sup>157</sup> While receiving workers' compensation benefits, he suffered chest pains which precipitated an emergency room visit.<sup>158</sup> After admittance to the hospital, it was discovered that he had only two major coronary arteries instead of the normal three.<sup>159</sup> Open heart surgery was successfully performed,

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148. *Id.* at 927.

149. 623 F. Supp. 1181 (D. Md. 1985).

150. *Id.* at 1183.

151. *Id.* at 1185.

152. *Id.*

153. *Id.* at 1184.

154. *Id.*

155. *Id.* at 1185.

156. 599 F. Supp. 731 (D.R.I. 1984).

157. *Id.* at 733.

158. *Id.* at 734.

159. *Id.*



and Bento received disability benefits for the next two years.<sup>160</sup> Although eager to return to work, Bento was denied employment by the defendant, I.T.O. Corporation.<sup>161</sup> Relying upon the language of the Rehabilitation Act, the court held that Bento was a handicapped person<sup>162</sup> because he suffered from a "documented physical impairment which substantially limit[ed] some of his major life activities."<sup>163</sup>

Minor to moderate circulatory impairments have not been afforded the protection of the Rehabilitation Act by the Eighth Circuit. In *Oesterling v. Walters*,<sup>164</sup> Oesterling, a Veterans Administration clerk/typist, was reassigned to a mailclerk position.<sup>165</sup> Oesterling objected to this reassignment on the ground that leg problems associated with varicose veins would prevent her from standing or walking for long periods of time.<sup>166</sup> After her application for disability retirement was denied, Oesterling filed suit alleging a violation of the Rehabilitation Act.<sup>167</sup>

The Eighth Circuit viewed the question of whether a person is a handicapped individual within the meaning of the Rehabilitation Act as one of fact.<sup>168</sup> The court compared Oesterling's facts against the first prong of the definition.<sup>169</sup> Although the court found that she had a physical impairment from varicose veins, her condition had been diagnosed as mild to moderate.<sup>170</sup> The court concluded the major life activities of standing and sitting were not substantially limited as a result of this impairment.<sup>171</sup> Therefore, the court held that Oesterling was not a handicapped individual under the Rehabilitation Act.<sup>172</sup>

#### 4. Other Physical Impairments

When an individual suffers from a kidney impairment, whether as the sole disabling condition or in conjunction with other ailments, the courts have found that the individual is handicapped within the

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160. *Id.*

161. *Id.* at 735-36.

162. *Id.* at 741.

163. *Id.* See also *Cook v. United States Dep't of Labor*, 688 F.2d 669 (9th Cir. 1982) (finding that the plaintiff, who suffered from angina, was a handicapped individual because he was regarded as having an impairment which substantially limited his life activities), *cert. denied*, 464 U.S. 832 (1983).

164. 760 F.2d 859 (8th Cir. 1985).

165. *Id.* at 860.

166. *Id.* at 860-61.

167. *Id.* at 860.

168. *Id.* at 861.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

meaning of the Rehabilitation Act.<sup>173</sup> Additionally, the courts have generally held that individuals who suffer from diabetes are handicapped individuals under the Rehabilitation Act.<sup>174</sup>

In *Vickers v. Veterans Administration*,<sup>175</sup> a government employee, Vickers, brought suit under the Rehabilitation Act, claiming he was a handicapped person because he was sensitive to tobacco smoke.<sup>176</sup> The court found that Vickers had a physical impairment which substantially limited one or more of his major life activities, in particular his capacity to work in an environment which was not completely smoke free.<sup>177</sup> Therefore, the court held that Vickers was a handicapped person within the meaning of the Rehabilitation Act.<sup>178</sup>

In contrast, the United States District Court for the Northern District of Georgia declined to find an Army employee handicapped under the Rehabilitation Act in *Stevens v. Stubbs*.<sup>179</sup> Stevens was downgraded from a vehicle operations manager position to a warehouseman.<sup>180</sup> Stevens brought suit on several grounds, alleging in one count that he was handicapped under the Rehabilitation Act.<sup>181</sup> Although Stevens had taken extensive leaves of absence,<sup>182</sup> he failed to present any evidence of a specific "physical or mental impairment which substantially limit[ed] one or more of his major life activities."<sup>183</sup> According to the court, the only evidence that Stevens produced was an "undisclosed transitory illness."<sup>184</sup> Furthermore, the court did not accept Stevens' argument that he was regarded by his employer as having an impairment since the record was totally devoid of any such evidence.<sup>185</sup> Therefore, since Stevens could not establish he suffered from any physical or mental impairment, or that he was regarded by his employer as having an impairment, the court held

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173. See *Grube v. Bethlehem Area Sch. Dist.*, 550 F. Supp. 418, 425 (E.D. Pa. 1982) (concluding that a high school student, who had a kidney removed, was a handicapped individual); *Poole v. South Plainfield Bd. of Educ.*, 490 F. Supp. 948, 953 (D.N.J. 1980) (concluding that a high school student, who was born with one kidney, was considered a handicapped individual).

174. See, e.g., *Serrapica v. City of New York*, 708 F. Supp. 64, 73 (S.D.N.Y.) (finding that an applicant for a sanitation worker position, who was medically disqualified because he suffered from diabetes mellitus, was handicapped under the Rehabilitation Act), *aff'd*, 888 F.2d 126 (2d Cir. 1989).

175. 549 F. Supp. 85 (W.D. Wash. 1982).

176. *Id.* at 87-88.

177. *Id.* at 86-87.

178. *Id.* at 86.

179. 576 F. Supp. 1409 (N.D. Ga. 1983).

180. *Id.* at 1410.

181. *Id.* at 1413.

182. *Id.*

183. *Id.* at 1414.

184. *Id.*

185. *Id.*

that he was not a handicapped person within the meaning of the Rehabilitation Act.<sup>186</sup>

## 5. Neurological Disorders

The courts have consistently found epilepsy to be a disability,<sup>187</sup> even in situations where the individual has not suffered an epileptic attack for a long time.<sup>188</sup> For example, in *Duran v. City of Tampa*,<sup>189</sup> the United States District Court for the Middle District of Florida determined that a police applicant satisfied the third prong of the definition of handicapped,<sup>190</sup> although he did not experience any grand or petit mal seizures for fifteen years or take medication for ten years.<sup>191</sup>

Similarly, in *Reynolds v. Brock*,<sup>192</sup> a former government employee, suffering from epileptic seizures, was considered a handicapped individual under the Rehabilitation Act.<sup>193</sup> The court based its holding on the first prong of the definition.<sup>194</sup> The court determined that Reynolds' epilepsy substantially limited her ability to work because both "federal and state regulations and policies restrict[ed] the types of jobs available to her."<sup>195</sup> For example, many states prohibit epileptics from obtaining driver's licenses unless they have not suffered a seizure for a specific length of time.<sup>196</sup> The court found that this inability to drive to work severely limited job opportunities for epileptics and, therefore, held in Reynolds' favor.<sup>197</sup>

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186. *Id.* at 1415.

187. See *Salmon Pineiro v. Lehman*, 653 F. Supp. 483, 490 (D.P.R. 1987) (finding that plaintiff suffered a handicap under the Rehabilitation Act because of extensive history of "convulsive episodes"); *Fitzgerald v. Green Valley Area Educ. Agency*, 589 F. Supp. 1130, 1135 (S.D. Iowa 1984) ("[P]laintiff has nocturnal epilepsy, dyslexia and cerebral palsy with left side hemiplegia. There appears to be no dispute that plaintiff is a 'handicapped individual.'"); *Drennon v. Philadelphia Gen. Hosp.*, 428 F. Supp. 809, 815 (E.D. Pa. 1977) ("That persons with epilepsy are considered handicapped is too self-evident to be contested.").

188. This view is consistent with the EEOC Interpretive Guidelines which state that "an individual with epilepsy would be considered to have an impairment even if the symptoms of the disorder were completely controlled by medicine." 56 Fed. Reg. 35,726 (1991).

189. 430 F. Supp. 75 (M.D. Fla. 1977).

190. *Id.* at 78.

191. *Id.* at 76.

192. 815 F.2d 571 (9th Cir. 1987).

193. *Id.* at 574.

194. *Id.* at 573-74.

195. *Id.* at 574.

196. *Id.*

197. *Id.*

Cerebral palsy, on the other hand, has not met with much success in the United States District Court for the Southern District of Ohio.<sup>198</sup> In *Pridemore v. Rural Legal Aid Society*,<sup>199</sup> Pridemore was denied employment as an attorney.<sup>200</sup> Analyzing the facts based upon all three prongs of the Rehabilitation Act's definition, the court held that Pridemore could not establish a prima facie case of handicap discrimination.<sup>201</sup> According to the court, the impact of cerebral palsy caused Pridemore to have poor control over his ocular muscles, thereby limiting his ability to read and to sustain eye contact.<sup>202</sup> Furthermore, Pridemore suffered from speech defects, although his speech could be understood by listeners.<sup>203</sup>

The court concluded that Pridemore was not a handicapped individual under the Rehabilitation Act because the cerebral palsy did not substantially limit any of Pridemore's major life activities.<sup>204</sup> Further, Pridemore did not have a record of an impairment because his cerebral palsy was diagnosed *after* he had applied for the job.<sup>205</sup> Finally, the court found Pridemore did not create a genuine issue of material fact regarding the third prong of the definition<sup>206</sup> because he did not mention he had cerebral palsy during the interview process.<sup>207</sup>

With respect to individuals diagnosed with multiple sclerosis, courts have generally found that these individuals are handicapped under the Rehabilitation Act.<sup>208</sup> For example, in *Carter v. Casa Central*,<sup>209</sup> a director of nursing was dismissed after being diagnosed with multiple sclerosis.<sup>210</sup> The defendant conceded at trial that Carter was a handicapped individual under the Rehabilitation Act.<sup>211</sup>

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198. *Contra* Fitzgerald v. Green Valley Area Educ. Agency, 589 F. Supp. 1130, 1132 (S.D. Iowa 1984) (finding that a school teacher, whose most apparent handicap was left side hemiplegia due to cerebral palsy, was a handicapped individual).

199. 625 F. Supp. 1180 (S.D. Ohio 1985).

200. *Id.* at 1182.

201. *Id.* at 1185.

202. *Id.* at 1183.

203. *Id.*

204. *Id.* at 1184.

205. *Id.*

206. *Id.* at 1185.

207. *Id.* at 1184.

208. "Multiple sclerosis is a disease that affects the central nervous system, that is the brain and spinal cord." *Carter v. Casa Central*, 849 F.2d 1048, 1050 n.1 (7th Cir. 1988). This condition can cause individuals to be totally incapacitated, or cause only intermittent periods of weakness, or other neurological loss of function. *Id.*

209. 849 F.2d 1048 (7th Cir. 1988).

210. *Id.* at 1054.

211. *Id.* at 1051. *Accord* Pushkin v. Regents of Univ. of Colo., 658 F.2d 1372,

## 6. Respiratory Ailments

The United States District Court for the Eastern District of Pennsylvania has addressed the relationship between respiratory ailments and individuals with handicaps under the Rehabilitation Act.<sup>212</sup> In *Fynes v. Weinberger*,<sup>213</sup> the court concluded that two navy yard employees, who suffered from asbestosis or asbestos-related diseases, were handicapped within the meaning of the Rehabilitation Act.<sup>214</sup>

## 7. Contagious Diseases

In addition to the Supreme Court's decision in *Arline*, other courts have held that an individual suffering from a contagious disease is a handicapped individual under the Rehabilitation Act. For instance, in *Kohl v. Woodhaven Learning Center*,<sup>215</sup> the court held that an applicant, seeking admission into the Woodhaven Learning Center, and who was diagnosed as being an active carrier of Hepatitis B,<sup>216</sup> was a handicapped individual within the meaning of the Rehabilitation Act.<sup>217</sup> The court focused on the third prong of the definition and determined that Kohl was "regarded as having a physical impairment" as a result of carrying Hepatitis B.<sup>218</sup> According to the court, the denial of admission to Kohl by Woodhaven Learning Center and Woodhaven School limited one of Kohl's major life activities.<sup>219</sup> The court then stated that this denial was primarily a result of the belief by both facilities that Kohl's condition posed a

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1376 (10th Cir. 1981) (holding that a medical doctor, who suffered from multiple sclerosis, was confined to a wheelchair, and had difficulty writing, was a handicapped person).

212. *Fynes v. Weinberger*, 677 F. Supp. 315 (E.D. Pa. 1985).

213. 677 F. Supp. 315 (E.D. Pa. 1985).

214. *Id.* at 321; see *supra* notes 37-43 and accompanying text.

215. 672 F. Supp. 1221 (W.D. Mo. 1987), *rev'd*, 865 F.2d 930 (8th Cir.), *cert. denied*, 493 U.S. 892 (1989). The Eighth Circuit accepted the district court's finding that Kohl was handicapped within the meaning of the Rehabilitation Act. *Kohl v. Woodhaven Learning Ctr.*, 865 F.2d 930, 935 (8th Cir.), *cert. denied*, 493 U.S. 892 (1989). The Eighth Circuit disagreed with the district court's application of the *Arline* test in two ways. *Id.* at 937.

First, the district court commingled the two parts of the test, analyzing the nature of the risk to others only after assuming its recommended accommodations were in place. Second, the district court paid unwarranted deference to the opinion of a particular health official as to what accommodations were reasonable.

*Id.* The Eighth Circuit reversed the district court order granting injunctive and declaratory relief to Kohl. *Id.* at 941.

216. *Kohl v. Woodhaven Learning Ctr.*, 672 F. Supp. at 1222.

217. *Id.*

218. *Id.*

219. *Id.*

threat to third persons within the facility.<sup>220</sup> Under this third prong, the court had little difficulty finding that Kohl was a handicapped individual.<sup>221</sup>

By expressly stating that individuals that are HIV positive are included within the meaning of disability under the ADA,<sup>222</sup> Congress left no room for judicial decision-making in this area. Nevertheless, under the Rehabilitation Act, the courts generally have held that persons with the Acquired Immune Deficiency Syndrome (AIDS) were handicapped individuals.<sup>223</sup>

## 8. Mental or Psychological Disorders or Impairments

The courts have generally held that individuals who are mentally retarded are handicapped within the meaning of the Rehabilitation Act.<sup>224</sup> Other more subtle mental or psychological disorders/impairments have not resulted in the same unanimity in the courts. The Second and Fifth Circuits, as well as the United States District Courts for the District of Columbia, the Southern District of Ohio, and the Eastern District of Pennsylvania, have found that mental and/or physical disorders are encompassed by the Rehabilitation Act's definition. In contrast, the Fourth Circuit has declined to hold that the psychological disorder of acrophobia falls within the meaning of handicapped individual as used in the statute.

In *Doe v. New York University*,<sup>225</sup> the Second Circuit decided if a medical student, who suffered from psychiatric and mental disorders, was handicapped under the Rehabilitation Act.<sup>226</sup> Doe was diagnosed as having a borderline personality disorder.<sup>227</sup> Her behavior

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220. *Id.*

221. *Id.*

222. See *supra* note 16 and accompanying text.

223. See *Robertson v. Granite City Community Unit Sch. Dist.*, 684 F. Supp. 1002, 1007 (S.D. Ill. 1988) (concluding that a child, who suffered from hemophilia B and was diagnosed as having an AIDS-related complex, was a handicapped individual); *Thomas v. Atascadero Unified Sch. Dist.*, 662 F. Supp. 376, 381 (C.D. Cal. 1986) (finding that a five year old boy infected with the AIDS virus was a handicapped individual); *District 27 Community Sch. Bd. v. Board of Educ.*, 502 N.Y.S.2d 325, 336 (N.Y. Sup. Ct. 1986) (finding that children with AIDS are handicapped individuals).

224. See *Flowers v. Webb*, 575 F. Supp. 1450, 1456 (E.D.N.Y. 1983) (finding that a 19 year old mentally retarded girl, who brought suit against the State Commissioner of the New York State Office of Mental Retardation and Developmental Disabilities, had demonstrated that she was handicapped under the Rehabilitation Act).

225. 666 F.2d 761 (2d Cir. 1981).

226. *Id.* at 774-75.

227. *Id.* at 768. A personality disorder is a serious condition which manifests itself by a series of five or more recognizable characteristics. *Id.* The court reasoned

consisted of numerous self-destructive acts as well as attacks upon other individuals.<sup>228</sup> These attacks were followed by both psychological treatments and admissions to various psychiatric hospitals.<sup>229</sup> The court concluded that Doe should be classified as a handicapped person under the Rehabilitation Act<sup>230</sup> because of her extensive history of mental impairments requiring hospitalizations.<sup>231</sup> According to the court, this history indicated that Doe suffered from a substantial limitation on a major life activity—"the ability to handle stressful situations of the type faced in a medical training milieu."<sup>232</sup> Furthermore, "New York University's refusal to readmit her on the ground that she posed an unacceptable risk to faculty, students, and patients made it clear that she was to be regarded as having such an impairment."<sup>233</sup>

The Fifth Circuit, in *Doe v. Region 13 Mental Health-Mental Retardation Commission*,<sup>234</sup> considered the situation where a psychiatric worker brought suit under the Rehabilitation Act after her employment was terminated.<sup>235</sup> Doe had been diagnosed as suffering from a "depressive neurosis."<sup>236</sup> Additionally she suffered from chronic insomnia and serious depression.<sup>237</sup> Her illness became so acute that she had to be hospitalized several times.<sup>238</sup> After her release from the hospital, she continued psychiatric treatment.<sup>239</sup> Shortly after expressing a wish to commit suicide, her employer discovered her medical history and terminated her employment.<sup>240</sup> The court, therefore, concluded that a mental handicap, such as that claimed by Doe, qualified under the Rehabilitation Act.<sup>241</sup>

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as follows:

A person suffering from this type of disorder is likely to have it continue throughout most of his or her adult life, subject to modification only by treatment by well-trained therapists over a period of years and adoption of a lifestyle which avoids situations that subject the person to types of stress with which he or she cannot cope.

*Id.*

228. *Id.* at 766.

229. *Id.*

230. *Id.* at 775.

231. *Id.*

232. *Id.*

233. *Id.*

234. 704 F.2d 1402 (5th Cir. 1983).

235. *Id.* at 1407.

236. *Id.* at 1404.

237. *Id.*

238. *Id.* at 1405.

239. *Id.*

240. *Id.* at 1406-07.

241. *Id.* at 1408.

Similarly, in *Matzo v. Postmaster General*,<sup>242</sup> a secretary, Matzo, employed by the USPS, brought suit under the Rehabilitation Act when her employment was terminated because of repeated absences.<sup>243</sup> Matzo claimed she was a handicapped person because she was a manic depressive.<sup>244</sup> She suffered from emotional problems and her behavior at work was erratic, disruptive, and insubordinate.<sup>245</sup> The United States District Court for the District of Columbia held that although the USPS had not disputed that Matzo's mental condition qualified her as a handicapped person within the meaning of the Rehabilitation Act,<sup>246</sup> the USPS had proved that Matzo was not "otherwise qualified," and that the USPS had made reasonable accommodations.<sup>247</sup>

The United States District Court for the Southern District of Ohio confronted similar discrimination by the USPS in *Franklin v. United States Postal Service*.<sup>248</sup> Franklin, an USPS employee, was terminated and subsequently brought suit under the Rehabilitation Act.<sup>249</sup> Franklin suffered from paranoid schizophrenia and was frequently hospitalized for this illness.<sup>250</sup> Working under the first prong of the definition, the court determined that Franklin's condition "may place [Franklin] in the handicapped category."<sup>251</sup>

The United States District Court for the Eastern District of Pennsylvania also considered schizophrenic reactions in light of the Rehabilitation Act in *Doe v. Colautti*.<sup>252</sup> Doe, an inmate in a private psychiatric hospital, brought suit under the Rehabilitation Act.<sup>253</sup> Doe was referred to the Institute of Pennsylvania Hospital following a suicide attempt,<sup>254</sup> and was diagnosed as suffering from a "schizo-affective reaction."<sup>255</sup> The court held that the "plaintiff unquestionably [was] a 'handicapped individual' within the meaning of [the Rehabilitation Act]."<sup>256</sup>

In contrast, the Fourth Circuit found that an individual suffering from acrophobia fell outside of the Rehabilitation Act's protection.

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242. 685 F. Supp. 260 (D.D.C. 1987), *aff'd*, 861 F.2d 1290 (D.C. Cir. 1988).

243. *Id.* at 261.

244. *Id.*

245. *Id.*

246. *Id.* at 262 n.4.

247. *Id.* at 264.

248. 687 F. Supp. 1214 (S.D. Ohio 1988).

249. *Id.* at 1215-16.

250. *Id.* at 1216.

251. *Id.* at 1218.

252. 454 F. Supp. 621 (E.D. Pa. 1978), *aff'd*, 592 F.2d 704 (3d Cir. 1979).

253. *Id.* at 624.

254. *Id.* at 625.

255. *Id.*

256. *Id.* at 626.



In *Forrisi v. Bowen*,<sup>257</sup> Forrisi was hired by the Department of Health and Human Services ("DHHS") as a utility systems repairer and operator.<sup>258</sup> The job description required Forrisi to climb stairways and ladders both for emergencies and for routine maintenance.<sup>259</sup> Because Forrisi suffered from acrophobia, he was unable to climb to certain heights.<sup>260</sup> Consequently, the DHHS terminated Forrisi's employment.<sup>261</sup>

Working under the first prong of the definition, the court examined whether Forrisi's impairment constituted a significant barrier to employment.<sup>262</sup> The court listed three factors that were relevant to this type of inquiry: "[T]he number and type of jobs from which the impaired individual is disqualified, the geographical area to which the individual has reasonable access, and the individual's job expectations and training."<sup>263</sup> The court determined that Forrisi did not fall under the first prong of the definition because his particular impairment prevented him from occupying only one position in his place of employment.<sup>264</sup> The court stated that a substantial limitation to working occurs when the employee's impairment generally forecloses the type of employment involved and not just one specific position.<sup>265</sup>

The court also rejected Forrisi's second argument that he was perceived as having an impairment.<sup>266</sup> The court stated that the DHHS terminated Forrisi because he was unable to perform the functions of one single position and not because the DHHS considered Forrisi to be handicapped.<sup>267</sup>

The Rehabilitation Act decisions encompass a wide array of conditions and impairments. Even more varied are the analyses employed by the courts when deciding if a given individual satisfies the definition of individual with handicaps. One common thread, however, ties all of these decisions together: Handicapping conditions fall within one of two categories. The first category contains those conditions, like mental retardation, that either because of their severity or their effect, qualify a person as an individual with a handicap. The second category encompasses those persons suffering

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257. 794 F.2d 931 (4th Cir. 1986).

258. *Id.* at 933.

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.* (citing *Jasany v. United States*, 755 F.2d 1244, 1249 (6th Cir. 1985)).

264. *Id.* at 934.

265. *Id.* at 935.

266. *Id.* at 934.

267. *Id.* at 935.

from other conditions that do not fit neatly within the Rehabilitation Act's definition. In this group, each person suffering must individually demonstrate that he or she qualifies as an individual with handicaps. As the decisions in this second category indicate, the success of a claim often depends on how well the claimant has met his or her burden of production. Unfortunately, relying upon Rehabilitation Act decisions in this second category to serve as the benchmark for future ADA disability decisions proves problematic.

## V. ANALYSIS OF THE ADA DEFINITION

By examining the Rehabilitation Act decisions and the EEOC regulations, a better understanding of the ADA definition of disability can be gained. Organizationally, this section discusses each prong of the ADA separately.

### *A. The First Prong: "A Physical or Mental Impairment that Substantially Limits One or More of the Major Life Activities of Such Individual"*

#### 1. Physical Impairment

Several federal courts have found that an individual was physically impaired under the first prong of the Rehabilitation Act.<sup>268</sup> Examples of conditions which were determined to be physical impairments include blindness,<sup>269</sup> deafness,<sup>270</sup> multiple sclerosis,<sup>271</sup> epilepsy,<sup>272</sup> and dwarfism.<sup>273</sup> One can logically conclude, therefore, that these same physical impairments would be found to meet the definition of disability under the ADA.

Conversely, some courts have determined that certain physical conditions did not meet the definition of a handicapped individual under the first prong.<sup>274</sup> In *de la Torres*, for example, the court determined that left-handedness was "a physical characteristic, not a chronic illness, a disorder or deformity, a mental disability, or a condition affecting [the plaintiff's] health."<sup>275</sup> Nor has body weight been considered a handicapping condition when it is self-imposed and voluntary.<sup>276</sup>

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268. See *supra* notes 37-43, 81-93, 156-63 and accompanying text.

269. See *supra* notes 134-35 and accompanying text.

270. See *supra* note 133 and accompanying text.

271. See *supra* notes 208-11 and accompanying text.

272. See *supra* notes 187-97 and accompanying text.

273. See *supra* notes 79-80 and accompanying text.

274. See *supra* notes 102-32 and accompanying text.

275. *de la Torres v. Bolger*, 781 F.2d 1134, 1138 (5th Cir. 1986) (per curiam).

276. *Tudyman v. United Airlines*, 608 F. Supp. 739, 746 (C.D. Cal. 1984).

The ADA's legislative history<sup>277</sup> and its EEOC regulations<sup>278</sup> would render these prior decisions consistent with the ADA's definition of disability. The House Committee on the Judiciary states:

[A] physical or mental impairment means:

[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine.

....

Physical or mental impairment does not include simple physical characteristics, such as blue eyes or black hair.<sup>279</sup>

## 2. Mental Impairment

Several courts have determined that various mental conditions fall within the scope of the Rehabilitation Act.<sup>280</sup> For example, in *New York University*, a medical student who suffered from psychiatric and mental disorders, which caused her to commit self-destructive acts, was considered a handicapped person under the Rehabilitation Act.<sup>281</sup> Individuals diagnosed with the following types of mental conditions also met the definition of mental impairment: mental retardation;<sup>282</sup> schizoaffective reaction, which caused the individual to become suicidal;<sup>283</sup> depressive neurosis, which caused the individual to be hospitalized several times;<sup>284</sup> manic depression, which caused the individual to suffer from emotional problems and whose behavior was erratic;<sup>285</sup> and paranoid schizophrenia, which caused the individual to be frequently hospitalized.<sup>286</sup>

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277. A physical or mental impairment means—

1) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; . . . .

S. REP. NO. 116, *supra* note 9, at 22; *see also* H.R. REP. NO. 485, pt. II, *supra* note 11, at 51, *reprinted in* 1990 U.S.C.C.A.N. at 333.

278. 29 C.F.R. §§ 1630.2(g), 1630.3 (1993).

279. *Id.* § 1630.2; *see also* H.R. REP. NO. 485, pt. III, *supra* note 11, at 28, *reprinted in* 1990 U.S.C.C.A.N. at 451.

280. *See supra* notes 225-55 and accompanying text.

281. *Doe v. New York Univ.*, 666 F.2d 761, 775 (2d Cir. 1981).

282. *See supra* note 224 and accompanying text.

283. *See supra* notes 251-55 and accompanying text.

284. *See supra* notes 234-41 and accompanying text.

285. *See supra* notes 242-46 and accompanying text.

286. *See supra* notes 247-55 and accompanying text.

These courts' interpretations of the term mental impairment are also consistent with the ADA's legislative history and the EEOC regulations. Both the House of Representatives Committee on the Judiciary Report and the EEOC regulations state that "mental impairment . . . means . . . any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities."<sup>287</sup>

### 3. Substantially Limits One or More of Life's Major Activities

The phrase "substantially limits one or more of the major life activities of an individual" was extensively scrutinized under the Rehabilitation Act's case law. Some physical and mental impairments were found *per se* to limit substantially a major life activity.<sup>288</sup> Examples of these types of physical impairments include blindness, the major life activity of seeing;<sup>289</sup> deafness, the major life activity of hearing;<sup>290</sup> and AIDS, the major life activity of procreation and intimate sexual relationships.<sup>291</sup>

Other physical and mental impairments, however, had to be analyzed on a case-by-case basis to determine the extent of the limitation upon an individual's life. For example, in *Arline*, the Supreme Court found that the physical impairment of tuberculosis substantially limited the major life activity of breathing.<sup>292</sup> Back problems causing extreme pain were determined to limit the major life activities of working, walking, sitting, and standing, in *Perez*.<sup>293</sup>

Conversely, other physical impairments were found *not* to limit a major life activity. In *Jasany*, the court determined that the physical impairment of crossed eyes did not substantially limit Jasany's life because he was able to participate fully in "school, work, sports, and recreational activities."<sup>294</sup> In *Oesterling*, the court determined that varicose veins, although a physical impairment, did not substantially limit Oesterling's life because the condition was diagnosed as mild to moderate.<sup>295</sup> The court, therefore, concluded that the major

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287. 29 C.F.R. 1630.2(h)(2); H.R. REP. NO. 485, pt. III, *supra* note 11, at 28, reprinted in 1990 U.S.C.C.A.N. at 450.

288. See *supra* notes 133-35, 187-88, 223-24 and accompanying text.

289. See *supra* notes 134-35.

290. See *supra* note 133.

291. H.R. REP. NO. 485, pt. II, *supra* note 11, at 52, reprinted in 1990 U.S.C.C.A.N. at 334; cf. *Robertson v. Granite City Community Unit Sch. Dist.*, 684 F. Supp. 1002, 1007 (S.D. Ill. 1988) (holding that an elementary school student with an AIDS-related complex was handicapped under the Rehabilitation Act).

292. *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 281 (1987).

293. *Perez v. Philadelphia Hous. Auth.*, 677 F. Supp. 357, 360 (E.D. Pa. 1987); *aff'd*, 841 F.2d 1120 (3d Cir. 1988).

294. *Jasany v. United States Postal Serv.*, 755 F.2d 1244, 1250 (6th Cir. 1985).

295. *Oesterling v. Walters*, 760 F.2d 859, 861 (8th Cir. 1985).

life activities of standing and sitting were not substantially limited.<sup>296</sup>

The ADA's legislative history and the EEOC regulations are consistent with these courts' interpretations of this term under the Rehabilitation Act. The Senate Committee on Labor and Human Resources states the following:

*A physical or mental impairment does not constitute a disability under the first prong of the definition for purposes of the ADA unless its severity is such that it results in a "substantial limitation of one or more major life activities." A "major life activity" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.*<sup>297</sup>

The EEOC regulations interpret the term substantially limits to mean:

- (1) Unable to perform a major life activity that the average person in the general population can perform; or
- (2) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.<sup>298</sup>

The legislative history and the EEOC regulations would appear, therefore, to validate the courts' conclusions in *Arline*, *Jasany*, *Perez*, and *Oesterling*.

#### *B. The Second Prong: "A Record of Such Impairment"*

Although fewer in number, the cases that have analyzed this prong of the definition generally performed a more extensive analysis than the cases under the first prong. Two of the three leading cases, *Arline* and *E. E. Black*, examined their sets of facts against this prong. In *Arline*, the Supreme Court determined that Arline had a record of an impairment because she had been hospitalized for tuberculosis.<sup>299</sup> Her medical history thus provided a sufficient record to meet this prong.<sup>300</sup> In *E. E. Black*, the plaintiff, Crosby, suffered back injuries on the job.<sup>301</sup> After undergoing a medical pre-employment examination that revealed the back injuries, the defendant, E.

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296. *Id.*

297. S. REP. NO. 116, *supra* note 9, at 22 (emphasis added).

298. 29 C.F.R. § 1630.2(j) (1993).

299. School Bd. of Nassau County v. Arline, 480 U.S. 273, 281 (1987).

300. *Id.*

301. E. E. Black, Ltd. v. Marshall, 497 F. Supp. 1088, 1091 (D. Haw. 1980).

E. Black, refused to hire Crosby.<sup>302</sup> The court determined that Crosby had a record (the physical examination) of a physical impairment (back injuries) and that this record substantially limited his employment opportunities.<sup>303</sup>

Other cases which have reached similar results include *Mental Health-Mental Retardation Commission*, in which a record of a mental impairment was one of the primary reasons behind the employer's decision to terminate the claimant's employment,<sup>304</sup> and *New York University*, in which the court concluded that the claimant should be classified as a handicapped person because of her extensive history of mental impairments requiring hospitalizations.<sup>305</sup>

A contrary result was reached by the *Pridemore* court. In *Pridemore*, an applicant for an attorney position, who suffered from cerebral palsy, was determined *not* to have a record of an impairment because the cerebral palsy was diagnosed *after* his job interview.<sup>306</sup> Thus, Pridemore did not have a record of an impairment at the time the employment decision was made.<sup>307</sup>

The ADA's legislative history and the EEOC regulations are consistent with the courts' interpretations of this term. The House of Representatives Committee on Education and Labor reported:

The second prong of the definition of the term "disability" includes an individual who has a record of such impairment, i.e., an individual who has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

This provision is included in the definition in part to protect individuals who have recovered from a physical or mental impairment which previously substantially limited them in a major life activity. Discrimination on the basis of such a past impairment would be prohibited under this legislation.<sup>308</sup>

The EEOC regulations state: "Has a record of such impairment means has a history of, or has been misclassified as having, a mental

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302. *Id.*

303. *Id.* at 1098.

304. *Doe v. Region 13 Mental Health-Mental Retardation Comm.*, 704 F.2d 1402, 1406-07 (5th Cir. 1983).

305. *Doe v. New York Univ.*, 666 F.2d 761, 775 (2d Cir. 1981).

306. *Pridemore v. Rural Legal Aid Soc'y*, 625 F. Supp. 1180, 1184 (S.D. Ohio 1985).

307. *Id.*

308. H.R. REP. NO. 485, pt. II, *supra* note 11, at 52, *reprinted in* 1990 U.S.C.C.A.N. at 334.

or physical impairment that substantially limits one or more major life activities."<sup>309</sup>

Both the ADA's legislative history and the EEOC regulations would agree with the courts' interpretations of this term. This prong, thus, intends to cover two types of individuals: (1) Those individuals who are discriminated against because they have a record of an impairment, such as individuals with histories of mental or emotional illness; and (2) those individuals who have been misclassified as having an impairment, such as an individual being falsely diagnosed as mentally retarded.<sup>310</sup>

*C. The Third Prong: "Being Regarded as Having Such an Impairment"*

In many ways, this prong is the most difficult one to satisfy. However, as *E. E. Black*, *Thornhill*, and *New York University* demonstrate, proving a disability under this prong is possible. In *E.E. Black*, Crosby, an apprentice carpenter, suffered back injuries.<sup>311</sup> He was subsequently permitted by an examining physician to return to work.<sup>312</sup> The contractor, however, refused to hire Crosby because it perceived that Crosby's back injuries made him disabled.<sup>313</sup> The court determined that Crosby was an individual with handicaps under the third prong of the definition because the contractor regarded Crosby as impaired.<sup>314</sup>

In *Thornhill*, the Army Corps of Engineers refused to hire the plaintiff in spite of two physicians concluding that the plaintiff's spinal deformity did not limit his lifting capacity.<sup>315</sup> The court held that there were sufficient material facts to find that Thornhill was a handicapped individual because of the Corps' perception that Thornhill's spinal deformity prevented him from performing his duties.<sup>316</sup>

In *New York University*, a medical student whose studies were terminated because she suffered from psychiatric and mental disorders was held to be a handicapped individual.<sup>317</sup> The court based its reasoning upon "NYU's refusal to readmit her on the ground that she pose[d] an unacceptable risk to faculty, students, and patients."<sup>318</sup>

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309. 29 C.F.R. § 1630.2(k) (1993).

310. S. REP. No. 116, *supra* note 9, at 23.

311. *E. E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088, 1091 (D. Haw. 1980).

312. *Id.* at 1091-92.

313. *Id.* at 1102.

314. *Id.*

315. *Thornhill v. Marsh*, 866 F.2d 1182, 1183 (9th Cir. 1989) (per curiam).

316. *Id.* at 1184.

317. *Doe v. New York Univ.*, 666 F.2d 761, 775 (2d Cir. 1981).

318. *Id.*

Therefore, the court concluded that she was regarded as having an impairment.<sup>319</sup>

Both the ADA's legislative history and the EEOC regulations would render these interpretations consistent with the statute. The House Representatives Committee on the Judiciary states:

This test is intended to cover persons who are treated by a covered entity as having a physical or mental impairment that substantially limits a major life activity. It applies whether or not a person has an impairment, if that person was treated as if he or she had an impairment that substantially limits a major life activity.<sup>320</sup>

The EEOC Regulations state the following:

- (1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;
- (2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
- (3) Has none of the impairments defined in paragraphs (h)(1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.<sup>321</sup>

## VI. CONCLUSION

When deciding if a particular individual falls within the protection of the ADA, the courts will likely consider both the Rehabilitation Act decisions and the EEOC regulations. Although predicting which disabilities will meet the ADA's definition is somewhat speculative, the courts will not likely try to reinvent the wheel. Therefore, one would expect many of the same impairments that have met the Rehabilitation Act's definition to also meet the ADA's definition. As the courts begin to create a comprehensive definition of disability, one would hope that they keep in mind the overriding purpose of the ADA and opt for a liberal construction. Inclusion is preferred over exclusion, just as the elimination of discrimination is preferred over its persistence.

Amalia Magdalena Villalba<sup>322</sup>

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319. *Id.*

320. H.R. REP. NO. 485, pt. III, *supra* note 11, at 29, *reprinted in* 1990 U.S.C.C.A.N. at 452.

321. 29 C.F.R. § 1630.2(l) (1993).

322. This Comment is dedicated to my daughter, Heather, who taught me that a deaf person can do anything except hear.